

EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
PETER ENEA, : 12-CV-0456 (GBD)
:
Plaintiff, :
:
v. : 500 Pearl Street
:
BLOOMBERG LP, : New York, New York
:
Defendant. : July 30, 2014
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE FRANK MAAS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE CLERK: Good morning, everyone. This is a phone
2 conference in the matter of Enea v. Bloomberg. This is
3 Jennifer, the judge's law clerk, and this phone conference is
4 being recorded. Could counsel please state your name for the
5 record?

6 MR. GETMAN: Dan Getman and Artemio Guerra for the
7 plaintiff.

8 MR. GOLDEN: And this is Thomas Golden and Andrew
9 Spital from Willkie Farr for the defendant

10 THE COURT: Good morning, counsel.

11 MR. GETMAN: Good morning, Your Honor.

12 MR. GOLDEN: Good morning.

13 THE COURT: The letters -- I guess the only issue is
14 whether there's been a waiver of the attorney-client privilege
15 with respect to the good faith defense, isn't that correct?

16 MR. GETMAN: I think, Your Honor, we all -- this is
17 Dan Getman for the plaintiff.

18 THE COURT: Got it.

19 MR. GETMAN: We also have an issue of discovery
20 cutoff and when discovery will continue until. I guess that's
21 the same thing.

22 THE COURT: Okay. Well, let's deal with the issue of
23 privilege first and then we'll talk about scheduling. The
24 floor is yours, Mr. Getman.

25 MR. GETMAN: Okay. Well, Your Honor, Bloomberg

1 asserts two affirmative defenses in this case, a good faith
2 defense and statute of limitations which in the case of the
3 FLSA, Fair Labor Standards Act, implicates the willfulness and
4 not the subjective knowledge and intent of the defendant here.
5 Bloomberg, because it has asserted the good faith defense,
6 which is a defense to a substantial portion of the liability in
7 the case, based on the clear law in the Second Circuit and
8 multiple decisions in the southern district that by asserting
9 good faith a corporation which knows only what it knows through
10 its agents, employees, agents within the scope of their --
11 acting within the scope of their agency, has brought its
12 knowledge or the knowledge of its agents into issue in this
13 case. The Bilvarian [Ph.] decision basically said that -- and
14 the progeny of multiple decisions in the southern district,
15 says that when you raise a good faith defense you are waiving
16 the privilege with respect to attorney/client advice and
17 discussion to the extent that those would show the knowledge of
18 the defendant or the party in this case.

19 Here Bloomberg has identified multiple individuals
20 both inside counsel and outside counsel that have knowledge and
21 information with respect to the FLSA obligations of the
22 company, but Bloomberg has also indicated that it will not
23 provide notes and documents with respect to those
24 communications. And that's what, you know, that's what we're
25 here to address.

1 This dispute has gone on for a period of time. Your
2 Honor initially required Bloomberg to identify counsel at one
3 of our last conferences, the counsel with information with
4 respect to Bloomberg's knowledge of its FLSA and state law
5 obligations. And then there's the period of dispute between
6 the parties where we attempted to resolve this. We had a meet
7 and confer, and then we filed initially a letter motion and
8 then -- I'm sorry, initially a motion in accordance with your
9 rules [indiscernible], letter request for a pre-motion
10 conference.

11 I think we've cited the relevant decisions in our
12 letters. I think Bloomberg has in its response primarily
13 addressed the court's language in the case of In re County of
14 Eerie, but that decision dealt only with a qualified immunity
15 defense and not a good faith defense. And so the language in
16 that decision is a little misleading when applied to the
17 question of what waiver occurs with an assertion of a good
18 faith defense.

19 County of Eerie did talk somewhat about reliance on
20 the advice of counsel but it was in the context of an entirely
21 different defense and it did not in any way overrule or alter
22 the Bulvarian [Ph.] decision which specifically held that good
23 faith waives the defense and is not a waiver only if a
24 defendant is raising reliance on the advice of counsel.
25 Bloomberg is claiming not to rely on the advice of counsel but

1 that, under Bulvarian is by no means the only predicate or the
2 limitation of the waiver.

3 So I think the decisions are clear if Your Honor has
4 either had a chance to read through our letter or read through
5 the cases.

6 THE COURT: I've done both.

7 MR. GETMAN: Okay. Great. Then I don't think I need
8 to go further into it. And that's our position. If Your Honor
9 has any questions.

10 THE COURT: No. Mr. Golden?

11 MR. GOLDEN: Okay. Thank you, Your Honor. First, I
12 want to be clear that at this point Bloomberg has merely
13 asserted as an affirmative defense in its answer to the
14 complaint [inaudible]. And as we then stated, we have a good
15 faith basis for that affirmative defense which does not
16 implicate the advice of counsel but rather it's based on
17 Bloomberg's interactions with the Department of Labor.

18 THE COURT: Suppose the Department of Labor said
19 [indiscernible] is fine and that's the basis for your good
20 faith defense but your outside counsel said it's good that the
21 Department of Labor came up with this incorrect ruling but in
22 point of fact we think that everything you're doing is wrong?

23 MR. GOLDEN: Well, Your Honor, respectfully I think
24 you could conjure up any scenario in which a defendant asserts
25 his defense that does not directly implicate the privilege.

1 And the plaintiff says yes, but if you receive contrary legal
2 advice that would undermine your defense and I'm entitled to
3 inquire into that.

4 And again, I think the case law makes clear, and
5 certainly Bulvarian makes clear, that there is not a blanket
6 rule that says if you assert a defense that could conceivably
7 be relevant to legal advice that you receive, that that waives
8 the privilege. Rather, what the court in Bulvarian said, what
9 both the district court said and the Second Circuit affirmed is
10 depending on the specifics as to how the argument is raised, in
11 this case depending on the specifics of Mr. Bulvarian's
12 testimony at trial regarding his state of mind, there may or
13 may not be a waiver. And I think at this point if Bloomberg
14 has not injected into the case reliance on counsel -- I'm
15 sorry, advice of counsel, or reliance on counsel, but rather a
16 good faith defense based on a very specific issue which is, or
17 set of facts, which is interactions with the Department of
18 Labor. I don't think there is any basis to hold that an
19 assertion of that affirmative defense results in a waiver of
20 the attorney/client privilege.

21 The only other thing I would add, Your Honor, is that
22 I think the way that I would suggest we look at this is not
23 that by asserting the affirmative defense Bloomberg has waived
24 the privilege, but rather whether Bloomberg is entitled to
25 continue to assert the attorney/client privilege and continue

1 to argue good faith. In other words, from my perspective, we
2 respectfully submit that there is no basis on which to hold
3 that Bloomberg has waived the attorney/client privilege. I
4 think the issue that Mr. Getman is raising is whether in light
5 of Bloomberg's assertion of the attorney/client privilege it
6 can continue to assert its good faith defense. And
7 respectfully, I think the question as to whether Bloomberg can
8 assert its good faith defense in light of its assertion of the
9 attorney/client privilege should depend on the specifics in
10 which Bloomberg has argued that good faith defense.

11 And again here the argument is based on a very
12 specific set of facts regarding the Department of Labor. Mr.
13 Getman may argue, and no doubt will argue to the jury or on
14 summary judgment that those facts are not compelling, that
15 those facts do not in fact support Bloomberg's good faith
16 defense. But again, I don't think there is any basis on which
17 to hold that Bloomberg has waived the privilege by asserting
18 that affirmative defense.

19 THE COURT: As I told Mr. Getman, I've read the
20 letters and the cases, many of which I was familiar with in
21 other contexts, and I don't think the issue is was privilege
22 affirmatively waived. The question is is there an implied
23 waiver or subject matter waiver or some principle of fairness
24 that dictates that Bloomberg not be able to play hard ball with
25 respect to any advice it received.

1 To my mind, this is a somewhat difficult area that is
2 [indiscernible], Mr. Golden, is inevitably very fact bound and
3 I think District Judge Ross in Missouri got it right when she
4 said that trying to [indiscernible] between a good faith
5 defense and a potential advice of counsel defense creates a
6 thin line that the party seeking to put forward the privilege
7 through testimony may cross, but that in this case that line
8 hasn't yet been crossed and perhaps never will be. So I'm not
9 going to grant Mr. Getman's application.

10 It strikes me, however, and I'm not the trial judge
11 so this is ultimately Judge Daniel's call, but much the same as
12 would apply to the assertion of the Fifth Amendment in a civil
13 as opposed to a criminal context. It seems to me it's probably
14 fair game for Mr. Getman to argue to the jury that merely from
15 the assertion of the privilege, continued assertion of the
16 privilege, the jury could draw a negative inference that
17 whatever advice may have been received was adverse to the
18 position that Bloomberg's taking in this case.

19 Just as an aside, I note that your letter, Mr.
20 Goldman, gave me Bloomberg's citations. I don't know whether
21 that's Bloomberg's policy in order to promote its legal
22 research services, but as far as I know the federal courts
23 don't have access to Bloomberg, so the cites are not terribly
24 helpful.

25 MR. GOLDEN: Your Honor, I apologize for that and we

1 will certainly, number one, make sure Bloomberg knows that and
2 number two, make sure that we're giving cites that are useful
3 to the court. So I apologize for that.

4 THE COURT: Does Bloomberg prefer you use their
5 cites?

6 MR. GOLDEN: It does. I mean well, it prefers that
7 everyone use their cites and certainly prefers that we use
8 their cites, but certainly not at the expense of
9 inconveniencing the court. So we'll make that clear to them.

10 THE COURT: Okay. I think that probably applies
11 nationwide. I [indiscernible] down to Bloomberg. Actually, my
12 understanding which may be inaccurate is every several years
13 they put out to bid, the courts, the legal research contract
14 and since there are or were only two services I was told
15 whichever service loses then provides its service free so in
16 any given year, one of them is being compensated, the other is
17 donating its services. I'm not suggesting Bloomberg should do
18 the same, but --

19 MR. GOLDEN: Yeah, I know. That's very helpful.

20 THE COURT: Okay.

21 MR. GETMAN: Your Honor, this is Dan Getman. If I
22 may have liberty to belabor the point for just --

23 THE COURT: Well, let me belabor it a minute.

24 MR. GETMAN: Okay.

25 THE COURT: I'm not precluding you from asking

1 questions so long as they're not abusive acts of periphery.
2 For example, I don't view it as privilege, or the response to
3 be privilege, if you were to ask the question did Bloomberg in
4 the relevant time period receive legal advice concerning and
5 getting a yes or no answer? I assume that to the extent that
6 there are writings that relate to this issue, a privilege log
7 has been furnished?

8 MR. GETMAN: No, it has not been.

9 THE COURT: It seems to me that if there are
10 documents responsive to requests, Mr. Golden, you need to
11 furnish a privilege log.

12 MR. GOLDEN: We will do so, Your Honor. Part of the
13 challenge has been that we've been going back and forth with
14 Mr. Getman on the parameters of an ESI search meaning who are
15 the custodians, what are the search terms. And obviously this
16 issue has been a gating issue and we have agreed that we will
17 conduct an ESI search for the relevant people in Bloomberg's HR
18 department who are involved in this issue generally and we will
19 certainly log any privileged communications in which those HR
20 people were engaged.

21 What we think would be inappropriate and unwarranted
22 is for us to have to search only -- or have to do a separate
23 search of attorneys' emails just for the purpose of logging the
24 attorneys' communications. Now again, most of these
25 communications will show up, for example, in an HR person's

1 email, but if there's an email between an in-house Bloomberg
2 attorney and an outside Bloomberg lawyer we argue we should not
3 have to run an ESI search for those emails just for the purpose
4 of identifying them on a log.

5 THE COURT: I'm not sure I buy that because it seems
6 to me the good faith of Bloomberg turns on the good faith of
7 pretty much everybody at Bloomberg such that if employee or
8 officer one had reason to believe that perhaps what Bloomberg
9 was doing was not kosher, then the fact that the HR people who
10 may ultimately have been the decision makers were uninformed
11 about those communications that led to that conclusion
12 elsewhere in the organization I'm not sure salvages what
13 Bloomberg is seeking to do by way of a defense. So I'm not
14 going to impose unduly burdensome ESI requirements on Bloomberg
15 but as to this specific issue it may in fact be necessary to
16 search, if there was a particular outside law firm, the easier
17 way to do it then, I don't know whether it's your firm or not,
18 but assuming for example that there were particular outside law
19 firms, certainly a search can be done by searching their files,
20 by searching in-house counsel's files for both. But I'm not
21 sure that I would exclude blanketly the further search we've
22 just been talking about.

23 MR. GOLDEN: So Your Honor, perhaps what Mr. Getman
24 and I can do is agree on, in light of Your Honor's guidance,
25 agree on search protocol. I hear Your Honor to say that

1 Bloomberg should not limit it to just HR professionals but
2 rather to the extent there were counsel who may have been
3 involved in this issue, they should be included in the search.
4 But to the extent there's a privileged communication involving
5 the counsel, that we should log it rather than produce it.

6 THE COURT: Absolutely.

7 MR. GETMAN: And Your Honor, if I may, there's sort
8 of some related questions here which are Bloomberg has now said
9 to you that their good faith defense is based on interaction
10 between Bloomberg and the Department of Labor.

11 THE COURT: Right.

12 MR. GETMAN: And I don't know if Mr. Golden is
13 asserting that that is the only basis of the defense. So
14 that's one question and maybe that can be clarified here on the
15 record. But I think what we've been given in this case has
16 been communications with the Department of Labor by Bloomberg
17 that have been redacted with respect to other job titles other
18 than the [indiscernible] position which is the plaintiff class
19 in this case. And in that -- so what happened was there was
20 somewhere contemporaneous with or after our filing this case
21 the Department of Labor began an audit of positions at
22 Bloomberg. I believe that prior to that audit Bloomberg simply
23 did not pay time and a half overtime to any job positions at
24 Bloomberg or were treated as salaried. And while there had
25 been no audits with respect to the positions, internal audits

1 of the positions, Bloomberg de facto treated the individuals as
2 -- just didn't pay overtime. I shouldn't say it treated them
3 as exempt. It just didn't pay overtime.

4 Now, the Department of Labor came in and said we
5 think there are 30 some odd positions that should be entitled
6 to overtime. There's a lot of back and forth between
7 Bloomberg's counsel and the Department of Labor. In that
8 context, so far as I know, all of the communications that
9 occurred between Bloomberg and the Department of Labor were
10 conducted by Bloomberg's counsel, and I believe that was
11 Willkie Farr. So Mr. Golden I believe handled a lot of that, a
12 lot of those discussions with the Department of Labor.

13 In that sense, the communications between Willkie
14 Farr and Bloomberg are kind of now being sliced out of this
15 equation or sliced out of the picture and Willkie Farr becomes
16 the mouthpiece for Bloomberg, and the exclusive mouthpiece for
17 Bloomberg with the Department of Labor. So there's kind of a
18 number of implications to that. One is of course the
19 communications between Willkie Farr or what Willkie Farr knew
20 with respect to Bloomberg's obligation to pay overtime
21 irrespective of its communications. Its knowledge of the
22 overtime law and positions would be relevant to the good faith
23 defense since Willkie Farr is effectively the agent of
24 Bloomberg with respect to FLSA compliance. So you know,
25 obviously that information kind of becomes relevant and

1 important.

2 So at a very specific level, Bloomberg has redacted
3 the Department of Labor's communications with Willkie Farr for
4 everything that does not specifically mention the GTECH
5 position. And as far as I know, the Department of Labor did
6 not address the GTECH position because litigation was ongoing,
7 and I believe Mr. Golden had expressed that to me previously.
8 So really the Department of Labor --

9 THE COURT: Wait, let me just interrupt you. So
10 there's no [indiscernible] that's un-redacted of any conditions
11 because the one position that Bloomberg took the view is
12 relevant specifically to carve out?

13 MR. GOLDEN: Your Honor, this is Mr. Golden. We have
14 produced to Mr. Getman all documents reflecting Bloomberg's
15 communications and Willkie's communications with the Department
16 of Labor with respect to the various jobs on which he had sued.
17 So we had communications with the Department of Labor on a
18 number of different positions. As Mr. Getman indicated, those
19 discussions resulted in some 30 jobs being reclassified. GTECH
20 was the job at issue in this case, was not among the positions
21 reclassified. So we have shared with Mr. Getman the
22 communications with the Department of Labor insofar as they are
23 relevant to the GTECH positions and a number of other positions
24 on which he has sued in other cases.

25 This issue was previously raised with Your Honor last

1 year on this very issue and I think Your Honor agreed that we
2 only had to produce the documents that are relevant to the job
3 issue in this case.

4 THE COURT: And I think that ruling is still correct
5 but there's case law to the effect that once a document is
6 relevant, redactions for relevance as opposed to privilege are
7 inappropriate and I'm not sure why that rule would not apply
8 here particularly because I suppose if they wish to do so, Mr.
9 Getman could file a Foyer request, and I'm not sure there's a
10 Foyer exemption that would preclude him from getting the entire
11 file.

12 MR. GOLDEN: Your Honor, I appreciate that.
13 Candidly, Mr. Getman has not raised this issue with us I don't
14 believe in several months and so it was not something I had
15 candidly given any thoughts in preparation for this call. I
16 think, you know, at this point I don't think there are really
17 any surprises with respect to the DOL. If Mr. Getman wants to
18 see all of our communications with the DOL even on jobs that
19 are not relevant here, I would like to discuss that with
20 Bloomberg again because it's being raised for the first time.

21 THE COURT: Your view -- let me just cut it short.
22 If you're being blind sighted by this in that there was no
23 discussion in preparation for this call indicating it would
24 come up, we can discuss it at some other time.

25 MR. GOLDEN: Yeah. And again, I understand that --

1 I'm not criticizing Mr. Getman. I'm just saying, you know, it
2 wasn't something that we had discussed and so I haven't been
3 able to discuss it with Bloomberg. I'm hopeful that we can,
4 you know, reach agreement with Mr. Getman but I'm just not in a
5 position on this call to speak for Bloomberg on it.

6 THE COURT: Right. And I'm not being critical of Mr.
7 Getman either. I just want to give the two sides an
8 opportunity to work it out if it can be resolved without me
9 getting involved [indiscernible] discussion about it.

10 THE COURT: Earlier, Mr. Getman, when you were
11 explaining the chronology it seems to me you were getting into
12 a second area which is scheduling, so tell me about that.

13 MR. GETMAN: Sure. Your Honor, if I may just go back
14 for one aspect just to make clear on the question of the DOL
15 investigation --

16 THE COURT: Right.

17 MR. GETMAN: -- I do believe that all of the
18 communications with the Department of Labor are relevant in
19 their entirety to this case. Bloomberg does have a number of
20 positions which are functionally very, very close to each
21 other. And so advice that pertains to one may very well apply
22 to others.

23 THE COURT: And that may be, but again, that's
24 something you should first discuss with Mr. Golden and then if
25 you're unable to resolve it, I'll certainly get in the loop.

1 MR. GETMAN: Absolutely. But I think Mr. Golden was
2 suggesting that Your Honor had already decided that issue and I
3 don't believe that there has been a decision that only the one
4 position is relevant and the others are not. I just wanted to
5 go back and correct that. And I'm happy to speak with Mr.
6 Golden further about it. We have been talking literally since
7 the case was filed. Since we learned of the DOL investigation
8 we have been haggling to obtain the very heavily redacted
9 information we've received so far. But I'm happy to continue
10 that process and present it when the positions are solidified.

11 THE COURT: Okay.

12 MR. GOLDEN: Your Honor, if I'm mis-recalling the
13 prior discussions with Your Honor on the subject, I apologize.
14 But Mr. Getman and I will no doubt go back and look at the
15 proceedings and we'll try to figure this out.

16 THE COURT: I don't know whether -- I think that was
17 in court, right, not on the phone?

18 MR. GETMAN: Yes. And I believe we have a
19 transcript.

20 THE COURT: That was going to be my question. I know
21 I have notes in my file but I wasn't sure whether there was or
22 was not a transcript.

23 MR. GOLDEN: Okay.

24 THE COURT: Okay. Scheduling?

25 MR. GETMAN: With respect to scheduling, Your Honor,

1 this is Dan Getman again, we have some remaining items. This
2 was obviously a good faith defense and communications related
3 to good faith have been a critical point that we have been
4 waiting to hold depositions and we were awaiting an ESI
5 production which involved negotiation of keywords, a lot of
6 disputes and months of disputes between the parties on what
7 keywords were going to be run. Our requests apparently were
8 run and on Monday we received a production from Bloomberg.
9 Apparently our keyword search yielded only two documents and we
10 now have those and we have two email boxes of the plaintiff
11 which the defendant provided as well on this past Monday. You
12 know, if this is all the production is, you know, I think we'll
13 be in a position to go through those email boxes.

14 I had expressed to Bloomberg that I'm out of the
15 office for most of August, returning at the very beginning of
16 September and had proposed that we have a discovery cutoff of
17 the end of September so that we can do the discovery during the
18 month of -- do the depositions, excuse me, during the month of
19 September.

20 We don't have a full witness list from Bloomberg and
21 I would like to have clarity on who its witnesses are with
22 respect to the issues in the case so we can take the
23 appropriate depositions and know that we have the right people
24 as well. So you know, my proposal would be that we get a list
25 of witnesses and that we schedule those depositions for

1 September and we should be ready to go.

2 I think there are a couple of issues that have not
3 been discussed with respect to how trial is going to take place
4 in the case, whether the trial is going to be bifurcated on the
5 issue of damages and such. And neither Judge Daniels nor the
6 parties have really weighed in on that at this point.

7 THE COURT: I take it there's no opposition to the
8 application, Mr. Golden?

9 MR. GOLDEN: No, there's not. Mr. Getman may be
10 confused about some of the facts regarding what we've produced
11 but fundamentally if Mr. Getman wants till the end of September
12 and Your Honor is okay with that, we don't have any problem
13 with it.

14 THE COURT: No, you folks have been getting along and
15 that counts for a lot. So I also have no problem. I'm still
16 trying to get my arms around an ESI keyword search that only
17 yields two documents. But putting that to the side --

18 MR. GOLDEN: Your Honor, that's one of the things I
19 alluded to.

20 THE COURT: I saw that.

21 MR. GOLDEN: It was something like 3,000 documents.
22 So I'm not sure why Mr. Getman thinks there was only two, but
23 perhaps we need to make sure that we've got a complete
24 production.

25 THE COURT: Well, it gives you more to talk about if

1 nothing else.

2 And there's no expert discovery in this case?

3 MR. GETMAN: There has not been. We don't anticipate
4 using an expert.

5 THE COURT: Okay.

6 MR. GETMAN: And Bloomberg hasn't identified anyone.

7 THE COURT: Okay. So the end of September as a
8 discovery cutoff is fine. Do we have any further conferences
9 scheduled?

10 MR. GOLDEN: I don't believe so, Your Honor.

11 THE COURT: Then at the end of this call we'll put
12 you on hold and find a date in early October for a further
13 telephone conference call. Have there been any settlement
14 discussions?

15 MR. GETMAN: Your Honor may recall that we actually
16 had a stay for a discussion of settlement and a mediation was
17 proposed and I believe was scheduled but we served our damage
18 calculations. Bloomberg indicated that they weren't interested
19 in I guess making a further proposal and the discovery stay was
20 then lifted at that time. So there's been no further
21 discussion since that time and that's where we are.

22 MR. GOLDEN: Right, Your Honor. Mr. Getman made a
23 settlement demand, we countered, and the parties both recognize
24 that at the moment we're just too far apart. And I think after
25 the depositions perhaps we can revisit that when both sides

1 have a better sense for the record.

2 THE COURT: That's fine. And we'll talk about that
3 in October when we next have a conference.

4 If there's nothing further, we'll put you on hold and
5 my law clerk will give you a date for a further phone
6 conference.

7 MR. GOLDEN: Thank you, Judge.

8 THE COURT: Thank you both for all of --

9 MR. GETMAN: Thank you, Your Honor.

10 THE COURT: Thank you. Take care.

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1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

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5 _____
6 Mary Greco

7 Dated: August 1, 2014
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